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Supreme Court, U.S.

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No. _____

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES DONOFRIO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Title 18 U.S.C. s.4241(d) provides that if a federal district court finds that a defendant is incompetent to stand trial on criminal charges, he shall be committed to the Attorney General for hospitalization for the reasonable period necessary to determine whether there is a probability that the defendant will attain the capacity to be tried.

1. Does the statute mandate commitment even though the initial inquiry into the defendant's competence reveals that there is no possibility that he will ever attain the capacity to stand trial because his condition is irreversible?
2. If so, does commitment of such a defendant under the statute violate his rights under the Due Process Clause of the United States Constitution?

LIST OF PARTIES

The parties to the proceedings before the Eleventh Circuit were James "Jimmy" Donofrio, appellant, and the United States of America, appellee.

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UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

The petitioner James Donofrio respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on March 22, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 896 F.2d 1301, and is reprinted in the appendix hereto, p. 1a, *infra*.

The memorandum decision of the United States District Court for the Middle District of Florida (Carr, D.J.), and the order of the magistrate which it approves, have not been reported. They are reprinted in the appendix hereto, pp. 5a and 7a, *infra*.

JURISDICTION

Petitioner, charged with extortionate means of debt collection, 18 U.S.C. s.891, was found incompetent to stand trial by a United States magistrate, who recommended that petitioner be committed to the custody of the Attorney General pursuant to 18 U.S.C. s.4241(d). The district court approved the magistrate's recommendation, and ordered petitioner's commitment to the Attorney General's custody for hospitalization under the statute.

The Eleventh Circuit reviewed the order pursuant to 28 U.S.C. s.1291 and the "collateral order" doctrine. On March 22, 1990 it entered a judgment and opinion affirming the district court's order. No rehearing was sought.

The jurisdiction of this Court to review the judgment and opinion of the Eleventh Circuit is invoked under 28 U.S.C. s.1254(1).

STATUTE INVOLVED

Due to its length, 18 U.S.C. s.4241 is reprinted in the appendix, p. 12a, *infra*, as are 18 U.S.C. ss.4246 and 4247. Of particular importance here is 18 U.S.C. s.4241(d):

18 U.S.C. s.4241. Determination of mental competency to stand trial

* * * * *

(d) Determination and disposition. If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility —

- (1) for such reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and
- (2) for an additional reasonable period of time until —
 - (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or
 - (B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

STATEMENT OF THE CASE

In March 1988 petitioner was charged in a two-count indictment with attempting to collect repayment of debts by extortionate means in violation of 18 U.S.C. s.891 during the period 1980-1984. After his release on a signature bond, petitioner entered a plea of not guilty and not guilty by reason of insanity.

At respondent's instance, the district court ordered petitioner to submit to a psychiatric examination for purposes of assessing his competence to stand trial. After the examination was completed, the court referred the matter to a magistrate for a competency determination.

The magistrate took evidence on the competency issue in

September 1988, at which time petitioner was 77 years old. The magistrate found petitioner to be incompetent to stand trial, based on the testimony of two experts who had examined him.^{1/}

One witness, a psychiatrist, testified that petitioner was suffering from primary degenerative dementia, which rendered him unable to understand the charges against him or to assist his counsel in his defense. The psychiatrist observed that his diagnosis was consistent with the findings of petitioner's treating physician, who believed petitioner had suffered severe memory loss and degenerative dementia as early as 1985.

The other expert, a clinical psychologist, diagnosed petitioner as suffering from moderate to severe chronic organic brain syndrome. This condition, he said, develops over a course of years, and he noted the complaint of petitioner's wife that he had begun having memory losses as many as 10 or 15 years earlier. The psychologist ventured that petitioner's condition had progressed to the point that he had only a vague notion of the charges against him, and that he was incapable of assisting his counsel.

Significantly, both experts testified that petitioner's condition was irreversible. His mental debilitation was certain to worsen, and there were indications that his rate of deterioration was increasing.

As mentioned, the magistrate concluded that petitioner was incompetent to stand trial, and ordered him committed to the custody of the Attorney General for hospitalization pursuant to 18 U.S.C. s.4241(d). Petitioner protested the order's commitment provisions to the distict court, which rejected his complaints and approved the magistrate's order.

On appeal to the Eleventh Circuit, petitioner argued that the statute was not intended to mandate commitment for further evaluation in the case of a defendant whose condition was known

1/ A third expert complained that his test results were of questionable validity because, he feared, petitioner's wife had assisted him with his responses. Given this, he was unable to opine whether petitioner was competent to stand trial.

to be permanent; in such a case, commitment could not serve any evaluative purpose, and would therefore violate the defendant's due process rights as expounded in *Jackson v. Indiana*, 406 U.S. 715 (1972).

The Eleventh Circuit rejected petitioner's arguments, and affirmed. The court held that the question whether petitioner's condition was permanent was not before the court at the competency hearing. Once a defendant is found incompetent to stand trial, the court wrote, it is appropriate that he be hospitalized for a careful determination of the likelihood of his regaining the mental capacity to stand trial. According to the court, the due process requirements of *Jackson* are met because the statute itself requires that the period of commitment be "reasonable" for that purpose.

The court noted that the Seventh Circuit confronted the same issues in *United States v. Shawar*, 865 F.2d 856 (7th Cir. 1989), and found the statutory language mandatory and consistent with due process.

REASONS FOR GRANTING THE WRIT

As interpreted by the Eleventh and Seventh Circuits, 18 U.S.C. s.4241(d) violates the due process rights of incompetent accuseds whose conditions are already known to be permanent and irreversible.

In *Jackson v. Indiana*, 406 U.S. 715 (1972), this Court established the due process parameters of the government's ability to commit an incompetent accused. "At the least," the Court held, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.*, 406 U.S. at 737 (emphasis added).

It was against this background that Congress enacted the Insanity Defense Reform Act of 1984, which in pertinent part revised the statutory scheme applicable to accuseds found to be incompetent to stand trial. Under this scheme there are three

circumstances which permit the commitment of an incompetent accused.

First, under section 4241(d)(1), an accused who has been found incompetent to stand trial "shall" be committed "for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed[.]"

Second, under section 4241(d)(2), the accused may be committed "for an additional reasonable period of time until...his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed[.]"

Finally, section 4246 furnishes a mechanism whereby the commitment of an accused who is due for release may be extended if his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and suitable arrangements for state custody and care of the accused are not available.

The interplay of these provisions was discussed in *United States v. Charters*, 829 F.2d 479, 484-487 (4th Cir. 1987). As the *Charters* court and the statutory language make clear, an accused's initial commitment under section 4241(d)(1) is strictly for evaluation of his prospects of regaining competence.

Petitioner submits that where the condition which causes the accused to be incompetent to stand trial is known to be permanent and irreversible, there can be no evaluative purpose in a commitment under the statute. That being the case, a commitment under these circumstances would violate the due process standards established in *Jackson, supra*.

Nevertheless, the court below agreed with the Seventh Circuit's finding in *United States v. Shawar*, 865 F.2d 856 (7th

Cir. 1989), that Congress's use of the word "shall" made commitment under section 4241 mandatory after a finding of incompetence to stand trial. But in focusing on the statutory language, the *Shawar* Court overlooked the judiciary's long history of interpreting the commitment statutes in light of due process principles.

Indeed, in *In re Newchurch*, 807 F.2d 404, 409 (5th Cir. 1986), the court observed that the Insanity Defense Reform Act of 1984 "must be read against the background of the constitutional protection for individual liberty." *Shawar* distinguished *Newchurch* on the sole ground that section 4247(b), the particular provision at issue there (governing commitment for examination of an accused who has asserted an insanity defense to the crime charged), continued to employ the permissive "may."

The court further pointed out that

[i]n *Jackson*, the Supreme Court, while disapproving of indefinite commitment solely on grounds of incapacity, held that a defendant could, under such circumstances, be held for the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. 406 U.S. at 733, 738, 92 S.Ct. at 1855, 1858. In enacting the Insanity Defense Reform Act of 1984, Congress clearly was aware of the Court's decision in *Jackson*, and echoed its language in s.4241(d). See S.Rep. No. 225, at 226.

Shawar, 865 F.2d at 863-864.

But Congress's awareness of the *Jackson* ruling is precisely why it could not have intended to make commitment mandatory in every case. For, though *Jackson* involved an indefinite commitment as opposed to a temporary one for evaluation, its due process analysis was premised on the notion that the accused's commitment must be justified by some purpose, and it must serve that purpose.

The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States...The bases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training...

* * * * *

We need not address these broad questions here...
At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

Jackson, 406 U.S. at 736-737 (emphases added; footnote omitted).

Thus, the Court held, an accused who is found incompetent to stand trial "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."

If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

Jackson, 406 U.S. at 738.

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Certainly in many cases, and perhaps in most, whether the mental condition of an incompetent accused might improve sufficiently to permit a trial is unknown or unclear at the time he is found to be incompetent. As the court below noted, the permanence *vel non* of the accused's mental condition is not material to the initial competency determination. Unless the likelihood of improvement is discernible from the nature of the accused's condition, the court may have no information in that regard. In those instances, commitment under section 4241(d)(1)

would bear some reasonable relation to the purpose of answering that question.

But in many other cases, petitioner's included, the impossibility of recovery is inherent in the condition which renders the accused incompetent, and so is obvious at the outset. Commitment under such circumstances would not bear a reasonable relation to the statute's purpose. For where, as here, the evidence is overwhelming and uncontradicted that the accused will *never* improve, *no* period of confinement could be considered reasonably necessary to determine whether there is a substantial probability that he will attain the capacity to stand trial in the foreseeable future. Under such circumstances, any confinement would be *unreasonable*, and would not meet the due process requirements described in *Jackson*.

The *Shawar* court conceded that there are two possible interpretations of section 4241(d). The first, the court said, would mandate that all incompetent accuseds be committed for evaluation for up to four months. The second would require commitment only if there is a probability that there will be a change in the defendant's mental condition. *Shawar*, 865 F.2d at 859. Another possibility overlooked by the court is that the statute would require commitment if at the time the accused is found incompetent his prognosis is unclear.

Shawar chose the first interpretation solely because of the word "shall" in the statute. In so doing, it overlooked the due process requirements which must inform any reading of the statute. Those requirements compel an interpretation of the statute in accordance with the second possibility (or the third). Otherwise, the statute must fail on due process grounds.

CONCLUSION

The Eleventh and Seventh Circuits have interpreted 18 U.S.C. s.4241 in a manner which renders it violative of the due process rights of the many incompetent accuseds whose conditions are known to be permanent and irreversible prior to commitment. For this reason, petitioner prays that this petition for certiorari will be granted.

Respectfully submitted,

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APPENDIX



**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**James "Jimmy" DONOFRIO,
Defendant-Appellant.**

No. 88-4015.

United States Court of Appeals,
Eleventh Circuit.

March 22, 1990.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH, Circuit Judge,
RONEY*, Senior Circuit Judge, and
ATKINS**, Senior District Judge.

RONEY, Senior Circuit Judge:

James "Jimmy" Donofrio, charged with extortionate means of debt collection, 18 U.S.C.A. § 891, was found incompetent to stand trial. The district court committed the defendant to the custody of the United States Attorney General for examination, pursuant to 18 U.S.C.A. § 4241. Donofrio appeals the commitment order on the ground that it is excessive. He argues that any period of commitment is unreasonable because evidence shows that he will never attain the capacity to permit a trial to proceed. We affirm.

^ Title 18 U.S.C.A. § 4241(d) provides that if a court finds that a defendant is incompetent to stand trial, he must be committed to the Attorney General for hospitalization until it can be determined whether a probability exists that the defendant

will regain the capacity to be tried.¹ We hold that this statute is mandatory and that the district court did not have the authority to circumvent the hospitalization.

This statute was passed in response to the Supreme Court decision in *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), which held that an incompetent defendant cannot be constitutionally confined beyond the reasonable period of time required to determine whether a substantial probability exists that mental competency for trial will be attained. An "indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial," said the Court, "does not square with the Fourteenth Amendment's guarantee of due process." *Jackson*, 406 U.S. at 731, 92 S.Ct. at 1854.

Donofrio argues that since the evidence at his competency hearing shows that his condition is permanent, it is a violation of *Jackson* to hold him, unless he is shown to be a danger under

1. Title 18 U.S.C.A. § 4241(d):

If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law; whichever is earlier. If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to section 4246.

section 4246 of the statute.² The permanency of Donofrio's condition was not an issue before the district court at that time, however. Once the court found by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to stand trial, then it was required "to commit the defendant to the custody of the Attorney General." The permanency of the condition would then be determined for later consideration by the court.

The Seventh Circuit recently confronted these issues and found the language of the statute mandatory and consistent with due process. It was argued in *United States v. Shawar*, 865 F.2d 856, 863 (7th Cir.1989), that because the incompetent would not recover, the purpose of the statute was fulfilled without commitment. The court held that the statute clearly provides that once a finding of incompetence to stand trial has been made, a defendant must be committed to the custody of the Attorney General. We agree with the holding of the Seventh Circuit.

Once the district court decides that a defendant is incompetent to stand trial, it is appropriate that he be hospitalized for a careful determination of the likelihood of regaining mental capacity to stand trial. The due process requirements of *Jackson* are met because the statute itself requires that the period of commitment be "reasonable" for that purpose. The statute limits confinement to four months, whether more time would be reasonable or not. Any additional period of confinement depends upon the court's finding there is a probability that within the additional time he will attain capacity to permit trial, 18 U.S.C.A.

2. Title 18 U.S.C.A. § 4246:

(a) **Institution of proceeding**—If the director of a facility in which a person is hospitalized certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property to another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

§ 4241(d)(2)(A), or if he is found to create a substantial risk to himself and to others, pursuant to 18 U.S.C.A. § 4246.

While the magistrate's order contains language that arguably could prolong confinement beyond the statutory mandate, that language is not part of the order which we affirm. The district court's order patently follows the statute and is restricted by the statutory provisions.

Although jurisdiction of this appeal was questioned by the court, it appears that both parties are correct in arguing that we have jurisdiction under 28 U.S.C.A. § 1291 and the "collateral order" doctrine, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), as more fully set forth in *United States v. Gold*, 790 F.2d 235 (2d Cir.1986).

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 88-68-CR-T-13(A)

UNITED STATES OF AMERICA

v.

JAMES "JIMMY" DONOFRIO

O R D E R

On July 20, 1988, the Court directed the United States Magistrate to conduct a hearing to determine the defendant's competency to stand trial. A hearing was held on September 7, 1988, and the magistrate concluded that the defendant was not competent to stand trial at this time. On September 15, 1988, the magistrate committed the defendant to the custody of the United States Attorney General pursuant to Title 18 U.S.C. §4241(d). The defendant has filed a motion to stay the magistrate's Order, a motion for release and discharge, and an objection to and petition for review of the magistrate's Order. For the reasons set forth below, all of the defendant's motions are hereby DENIED.

The thrust of the defendant's motions is that no evidence was presented and the magistrate did not conclude that the defendant is a danger to himself or to others and, therefore, the defendant should be discharged and not committed to the custody of the Attorney General. However, a plain reading of the relevant statutes shows that the magistrate's Order was proper. Title 18 U.S.C. §4241(d) provides that:

If . . . the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the Court *shall* commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility —

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; or

(2) for an additional period of time until —

(A) his mental condition is so improved that trial may proceed, if the court find that there substantial probability that within such additional time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

The commitment provision of section 4241 is mandatory and does not provide for an assessment of whether the defendant is a danger to himself or others. Such an assessment is made under §4246, but only after the term of commitment under §4241 runs its course. Accordingly, the Magistrate's Order is hereby approved and the defendant's motions are DENIED.

DONE AND ORDERED in Chambers in Tampa, Florida
this 17th day of November, 1988.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 88-68-CR-T-13A

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES DONOFRIO,
Defendant.

ORDER

THIS CAUSE came on for hearing on September 7, 1988 in order to determine the Defendant's competency to stand trial.¹ The Defendant and the United States of America were represented by counsel. The Court heard and has considered the testimony of Daniel J. Sprehe, M.D., and Sidney J. Merin, Ph.D., on behalf of the Defendant, and Arthur J. Forman, M.D., on behalf of the Government. Also considered was the transcript of the testimony of John Hampton, M.D., taken on March 6, 1988 on behalf of the Defendant, as well as the written reports of Dr. Merin and Dr. Forman. Based upon the foregoing, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Defendant, James Donofrio, is a 77 year old man charged by an Indictment with Federal criminal offenses pursuant to 18 U.S.C. §894.

2. Pursuant to a motion made on behalf of the Defendant to determine his competency to stand trial Mr. Donofrio was examined and tested by experts in the field of psychology and psychiatry.

3. Dr. Daniel J. Sprehe, a psychiatrist, testified that in his opinion, to a reasonable medical probability or certainty, Mr. Donofrio suffers from primary degenerative dementia. According to Dr. Sprehe, as a consequence of this condition the Defendant

¹ This matter was specifically referred to the undersigned by United States District Judge George C. Carr by Order dated July 20, 1988.

is not competent to stand trial because he is not able to understand the nature of the charges and proceedings against him, nor to assist in the preparation of his defense. Dr. Sprehe indicated that he based his conclusions on his independent testing and evaluation of Mr. Donofrio. Dr. Sprehe testified further that after he concluded his testing and evaluation of Mr. Donofrio he reviewed the report and testing performed by Dr. Sidney J. Merin, as well as the transcript of the testimony given by Dr. John Hampton. It was Dr. Sprehe's testimony that this information supported his original opinion.

4. The opinion of Dr. Sprehe is confirmed by Mr. Donofrio's treating physician, Dr. Hampton, and the assessment of the Defendant by the Geriatric Medical Clinic at the University of South Florida performed on Dr. Hampton's referral. In Dr. Hampton's opinion Mr. Donofrio was suffering from severe memory loss and degenerative dementia as early as 1985.

5. Dr. Sidney J. Merin testified that Mr. Donofrio was suffering from moderate to severe chronic organic brain syndrome. In Dr. Merin's opinion, the Defendant is not, to a reasonable psychological probability or certainty, competent to stand trial. According to Dr. Merin the Defendant is not able to understand or appreciate the nature of the charges and proceedings against him, nor can he assist his attorney with the preparation of his defense.

6. In his written report the Government's expert witness, Dr. Arthur J. Forman stated:

My diagnosis is that of Depression in an individual with an Antisocial Personality Disorder, who may or may not be suffering from a Mild Organic Brain Syndrome (this last diagnosis is purely on subjective complaints of the patient not being able to remember, yet because of the patient's lack of cooperation on the memory tests, and his very evident efforts to try and make me believe that his memory was worse than it indeed was, this diagnosis is very "iffy").

It is my belief that this defendant is not suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Letter from Dr. Forman to Judge Carr dated May 10, 1988.

7. Dr. Forman's report was received in evidence subject to the Defendant's right to cross-examination. On cross-examination Dr. Forman testified that because of Mrs. Donofrio's apparent participation in the testing process the results of his tests were of questionable validity. Dr. Forman went on to state that given the invalidity of his test results, he could not state with reasonable medical probability or certainty that Mr. Donofrio was competent to stand trial, to understand the nature of the charges against him, or to assist his attorney in connection with the presentation of a defense to the crimes charged.

8. Based upon the foregoing, the Defendant, James Donofrio, lacks both the capacity to understand the nature and consequences of the charges against him and the capacity to assist in the preparation and presentation of his defense. Mr. Donofrio does not, at this time, possess the ability to consult with his attorney with a reasonable degree of rational understanding, nor does he possess a rational and factual understanding of the proceedings against him.

CONCLUSIONS OF LAW

1. The test for mental competency to stand trial under 18 U.S.C. §4241 is whether the defendant has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him. 18 U.S.C. §4241; *United States v. Fratus*, 530 F.2d 644, 647 (5th Cir. 1976) *cert. denied*, 429 U.S. 846 (1976); *Scarborough v. United States*, 683 F.2d 1323 (11th Cir. 1982) *cert. denied*, 459 U.S. 1220 (1982).

2. Based upon a preponderance of the evidence, it is the finding of the undersigned that the Defendant James Donofrio is not competent to stand trial as a matter of law because he is not competent to understand the nature of the charges and/or proceedings against him and because he cannot assist his attorney with the presentation of a defense to the pending charges.

3. Title 18 U.S.C. §4241 provides in pertinent part:

If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incom-

petent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility.

- (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and
- (2) for an additional reasonable period of time until
 - (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or
 - (B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

18 U.S.C. §4241(d). Because Defendant Donofrio is not competent to stand trial at the present time he must be committed to the custody of the Attorney General for hospitalization in a suitable facility in accordance with section 4241(d).

Based upon the findings of fact and conclusions of law set forth herein, it is, upon consideration

ORDERED and ADJUDGED that Defendant James Donofrio be committed to the custody of the Attorney General or his authorized representative, for hospitalization in accordance with the provisions contained in 18 U.S.C. §4241(d). The Attorney General shall report to the Court on the Defendant's status not

later than four months from the date of his commission and bi-monthly thereafter if it is determined that the Defendant's condition has not improved so that trial may proceed, until such time as the Defendant becomes subject to the provisions of 18 U.S.C. §4246. It is recommended that the Defendant be promptly transported to the Federal Medical Center at Springfield, Missouri.

DONE and ORDERED in Chambers at Tampa, Florida, this 15th day of September, 1988.

PAUL GAME, JR.
UNITED STATES MAGISTRATE

Title 18 U.S.C.

§ 4241. Determination of mental competency to stand trial

(a) Motion to determine competency of defendant.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a sub-

stantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) Discharge.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) Admissibility of finding of competency.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

§ 4246. Hospitalization of a person due for release but suffering from mental disease or defect

(a) Institution of proceeding.—If the director of a facility in which a person is hospitalized certifies that a person whose sentence is about to expire, or who has been committed to the

custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) Psychiatric or psychological examination and report.— Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

(1) such a State will assume each responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(e) Discharge.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him that has been certified to the court as appro-

priate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court any any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) Revocation of conditional discharge.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) Release to state of certain other persons.—If the director of a facility in which a person is hospitalized pursuant to this subchapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than ten days after certification by the director of the facility.

§ 4247. General provisions for chapter

(a) Definitions.—As used in this chapter—

(1) “rehabilitation program” includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

(D) organized physical sports and recreation programs; and

(2) “suitable facility” means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

(b) Psychiatric or psychological examination.—A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good

cause that the additional time is necessary to observe and evaluate the defendant.

(c) Psychiatric or psychological reports.—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

- (1) the person's history and present symptoms;
- (2) a description of the psychiatric, psychological, and medical tests that were employed and their results;
- (3) the examiner's findings; and
- (4) the examiner's opinions as to diagnosis, prognosis, and—
 - (A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;
 - (B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;
 - (C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;
 - (D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or
 - (E) if the examination is ordered as a part of a

presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic report and information requirements.—(1) The director of the facility in which a person is hospitalized pursuant to—

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person hospitalized after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is hospitalized pursuant to section 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

(f) Videotape record.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired.—Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge.—Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General.—

The Attorney General—

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

